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No. 73-698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FRIENDS OF THE EARTH, WASATCH MOUNTAIN CLUB, INC. and KENNETH G. SLEIGHT, *Petitioners*

v.

GILBERT STAMM, Commissioner, Bureau of Reclamation, and ROGERS C. B. MORTON, Secretary of the Interior

and

STATE OF COLORADO, STATE OF UTAH, COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, INTER-MOUNTAIN CONSUMER POWER ASSN., NORTHERN DIVISION POWER ASSN., INC., CENTRAL UTAH WATER CONSERVANCY DISTRICT, and COLORADO-UTE ELECTRIC ASSOCIATION, *Intervenors*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR THE COLORADO RIVER WATER CONSERVATION DISTRICT AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT

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BRIEF IN OPPOSITION FOR THE COLORADO RIVER WATER CONSERVATION DISTRICT AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT

PROCEEDINGS TO DATE

In addition to the opinion of the court of appeals (Pet. App. B, 485 F.2d 1) and the opinion of the district court (Pet. App. A, 360 F. Supp. 165), this matter has been before this Court on Petitioners' application, dated May 1, 1973, to vacate the stay order entered by the Tenth Circuit, which was denied by this Court on May 14, 1973 (Oct. Term, 1972, No. A-1111, 411 U.S. 980, 36 L.Ed.2d 956).

QUESTIONS PRESENTED

1. Was the last sentence of Section 3 of the Colorado River Storage Project Act of 1956 (70 Stat. 105)[1] prospective only?

2. If not, are its limitations impliedly repealed or ineffective as to Rainbow Bridge National Monument?

STATUTES INVOLVED

In addition to the statutes cited by petitioners, including those reproduced in their Appendix C, Section 202[2] of the Colorado River Basin Project Act of 1968 (82 Stat. 885) is considered pertinent. That section is as follows:

> That Congress declares that the satisfaction of the requirements of the Mexican Water Treaty from the Colorado River constitutes a national obligation which shall be the first obligation of any water augmentation project planned pursuant to section 201 of this Act and authorized by the Congress. Accordingly the States of the Upper Division (Colorado, New Mexico, Utah, and Wyoming) and the States of the Lower Division (Arizona, California, and Nevada) shall be relieved from all obligations which may have been imposed upon them by Article III(e) of the Colorado River Compact so

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[1] 43 U.S.C. § 620b.

[2] 43 U.S.C. § 1512.

long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to satisfy the requirements of the Mexican Water Treaty together with any losses of water associated with the performance of that treaty: *Provided*, That the satisfaction of the requirements of the Mexican Water Treaty (Treaty Series 994, 59 Stat. 1219), shall be from the waters of the Colorado River pursuant to the treaties, laws, and compacts presently relating thereto, until such time as a feasibility plan showing the most economical means of augmenting the water supply available in the Colorado River below Lee Ferry by two and one-half million acre-feet shall be authorized by the Congress and is in operation as provided in this Act.

STATEMENT

The interests of the two Districts. The Colorado River Water Conservation District and the Southwestern Water Conservation District, here as intervenors-respondents, are public agencies of the State, each established by a special act of the Colorado legislature.[3] Together they geographically encompass all of the area in Colorado west of the continental divide, which area is the source of 70% of the total flow of the Colorado River. Rivers included are the headwaters and a substantial part of the runoff area of the mainstem of the Colorado River and many of its principal tributaries including the San Juan, Dolores, Gunnison, White and Yampa Rivers, as well as numerous streams tributary to them. Both Districts have the statutory responsibility of conserving and applying to beneficial use in their respective areas the waters of the Colorado River and its tributaries within the State. It is the integrity of this river system, as

[3] Colo. Rev. Stat. (1963), as amended, § 150-7-1 *et seq.* (The River District); Colo. Rev. Stat. (1963), as amended, § 150-8-1 *et seq.* (The Southwest District); collectively referred to as "the Districts."

regulated by the Glen Canyon Dam and reservoir, as a water supply for the people of these Districts and for others in the Basin of the Colorado River, which is at stake in this suit. If Petitioners are successful the dam, long since constructed to impound water to elevation 3700 will instead operate somewhere around elevation 3600, reducing the active design storage capability of the reservoir (Lake Powell) from in excess of 25,000,000 acre-feet to about one-half of that, or 12,750,000 acre-feet. The result according to affidavits filed below by the State of Colorado would be to cut Colorado's entitlement by at least 800,000 acre-feet annually. Most if not all of this impact would fall on the area of the two Districts.

Background of this case. The Colorado River Project and Participating Projects Act of 1956 (70 Stat. 105)[4] was a continuation of a longstanding Congressional policy, commenced in 1902 by the passage of the Reclamation Act (32 Stat. 388),[5] of providing a water supply for the arid West. Pursuant to this policy, life-giving water available through erratic stream flow is regulated and stored through the construction of dams, and the head thereby obtained is used to generate essential electric power, the sale of which defrays in part the costs of associated projects.

Thus the Project Act of 1956 authorized in Section 1[6] the Construction of four river regulation and storage facilities, three with hydroelectric power generating facilities. Of the four, Glen Canyon Dam and Reservoir is by far the largest in terms of storage and generating capacity. Section 1 of this same Act also authorized for construction eleven participating projects, five of which

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[4] 43 U.S.C. § 620 *et seq.* (hereinafter Project Act of 1956).

[5] 43 U.S.C. § 371 *et seq.*

[6] 43 U.S.C. § 620.

are within the geographic area of the Districts.[7] Subsequent amendments by Congress in 1964 and 1968 authorized for construction eight additional participating projects within the area of the Districts.[8] The 1968 amendments were accomplished through the Colorado River Basin Project Act of 1968. A principal purpose of this Act was to provide a supplemental water supply in the Lower Basin by means of the Central Arizona Project, a project which had been before the Congress in one form or another for some two decades. This project, by the express provisions of the Basin Project Act of 1968, is totally dependent for a water supply upon the filling and operation of Glen Canyon Reservoir (Lake Powell) at the authorized elevation to which it has been constructed, namely elevation 3700.

The Petitioners initially contended that the respondent Secretary be directed either to construct protective works to preclude impairment of Rainbow Bridge National Monument, which they thought were required by Section 1, or, alternatively, to operate Glen Canyon Dam so as to keep Lake Powell waters below elevation 3606 and thus out of the Monument, which they said was intended by the

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[7] Florida, Paonia, Silt and Smith Fork, all of which are constructed, and Pine River Extension which has since been dropped as infeasible. "Participating projects" are those dependent upon the water storage and revenue capabilities of the four storage units both for water supply and to defray that portion of the cost of the irrigation facilities which cannot be paid for by the irrigators. See 43 U.S.C. § 620d.

[8] Savery-Pot Hook and Fruitland Mesa, not yet constructed, and Bostwick Park, constructed, were added as participating projects on September 2, 1964, 78 Stat. 852. Five presently unconstructed participating projects, namely, Animas-LaPlata, Dallas Creek, Dolores, San Miguel and West Divide were added in 1968 as a part of the Colorado River Basin Project Act of 1968, 82 Stat. 885 (this latter Act is hereinafter referred to as the Basin Project Act of 1968).

last sentence of Section 3. In the trial court they abandoned the first alternative, acknowledging the Section 1 direction to have been repealed by implication, and predicated their whole case on the Section 3 language. The trial court agreed.

The court of appeals reversed by a five to two majority recognizing that the admitted implied repeal of Section 1 must, of necessity, render ineffective any prohibition in Section 3 as to Rainbow Bridge National Monument, leaving that Section intact as to all other national parks and monuments.[9]

ARGUMENT

The Districts contended below that all of the Section 3 language was prospective only and had no application to Rainbow Bridge National Monument, which was specifically provided for in Section 1. It appears to the Districts to be inconceivable that Congress, having told the Secretary to take adequate protective measures to preclude "impairment" of the Monument, whatever this word may then have been intended to mean,[10] would then addition-

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[9] Several states have filed briefs *amici* herein urging the granting of the writ on the assertion that the decision below will lead inevitably to other encroachments on the National Park and Monument System, nationwide. Nothing could be further from the fact, and this emotional appeal should be ignored. There is not one other National Park or Monument in any state, let alone the *amici* states, threatened by the court of appeals result. This expressed fear of further encroachment appears to be designed to expand a one time only situation, not usually reviewed by this Court, into some kind of an important national issue.

[10] Impairment—(1) An impairing or being impaired; (2) damage, injury, deterioration. Websters New Twentieth Century Dictionary, 2nd ed. (1970). The only impairment here present, if any, is visual in nature and is subjective.

It was stipulated in the trial court that no physical damage to the Bridge itself was claimed. In any event, the court of appeals has furnished adequate protection against such contingency by directing that the trial court retain jurisdiction for ten years.

ally prohibit any encroachment of water into the Monument area by Section 3. If the Section 3 language applies, the Section 1 language is unnecessary and meaningless. The rule of statutory interpretation requiring the specific to control over the general [11] indicates Section 3 to have no application to the Rainbow Bridge National Monument. It is apparent from the language of Section 3 that the entire section was meant to be prospective in effect.[12] The section deals with the possibility of future authorizations of additional projects. Conservationist elements, including predecessor organizations of at least one of the petitioners here, who had successfully offered opposition to the then proposed Echo Park Dam as a storage unit on the basis that it would inundate part of the Dinosaur National Monument, were apprehensive that Section 3 would be used to reinsert this project in the future. The last

[11] "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *MacEvoy Company* v. *U.S.*, 322 U.S. 102, 107 (1944).

[12] The full text of Section 3 (70 Stat. 107, 43 U.S.C. § 620b) is as follows:

> It is not the intention of Congress, in authorizing only those projects designated in section 620 of this title, and in authorizing priority in planning only those additional projects designated in section 620a of this title, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use by States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the Congress of additional projects under the allocations in the compacts as additional needs are indicated. It is the intention of Congress that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument.

sentence of Section 3 was added as assurance that Echo Park Dam would not thus be revived. This is abundantly clear from the language of the House Committee report, dated February 14, 1956 (H.R. Rep. No. 1087, Part 2, at 12) as follows: ". . . [This] Amendment . . . puts into language the position which the Committee has previously taken by its deletion of Echo Park from the units authorized to be constructed."

Subsequent Congressional action, as opposed to the alleged inaction relied upon by petitioners, clearly demonstrates Congress did not intend Section 3 to apply to Rainbow Bridge National Monument. The 1964 Act [13] authorized three and the 1968 Act [14] authorized five additional participating projects in the area of the Districts entirely dependent economically and for water supply upon full operation of Glen Canyon Dam and Reservoir.

Of further significance, other and specific provisions of the 1968 Act and its legislative history render, in our view, any other conclusion untenable. In addition to the references thereto in the other briefs in opposition, such as the reservoir operating criteria, the specific references to reservoir capacity at elevation 3,700 feet msl, and the Granite Reef Aqueduct capacity, at least two other facts should be noted.

First, the Mexican Water Treaty [15] obligation of 1,500,000 acre-feet of water per annum, in addition to being made a national obligation, is to be satisfied from the first water available from augmentation of the Colorado River water supply. As well informed as the Congress was, they would hardly have considered it necessary to augment a river's water supply, while abandoning 12,000,000 acre-

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[13] 78 Stat. 852, 43 U.S.C. §§ 616ii through 616*ll*.

[14] 82 Stat. 896, 43 U.S.C. § 620.

[15] Treaty Series 994, 59 Stat. 1219 (1944).

feet of the storage capacity already constructed on this river.

Second, in all of the hearings [16] leading to the passage of the 1968 Act, we have been unable to find any reference or claim whatsoever that the Central Arizona Project would be infeasible as to water supply, because Section 3 required Lake Powell to be operated at half capacity. On the contrary, it was clear from the testimony that the feasibility of the Central Arizona Project and the other projects authorized was predicated not only on full operation of Glen Canyon Dam and Lake Powell at elevation 3700 but also on spills expected to be available from operations at that level.[17]

On the other hand, if it be assumed, as did the court of appeals below, that the Section 3 language included Rainbow Bridge National Monument, the implied repeal of the protective measures requirement in Section 1 certainly rendered the Section 3 language ineffective as well, as to that Monument.

Petitioners attributed the implied repealer as to the Section 1 language to the special language appearing in the Public Works Appropriation Acts.[18] If this effect can

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[16] Hearings on S. 1658 before the Subcommittee of the Senate Committee on Interior and Insular Affairs, 88th Cong., 1st & 2nd Sess. (1963-1964); same on H.R. 4671, House of Representatives, 89th Cong., 1st Sess. (1965); same, House, 89th Cong. 2nd Sess. (1966); same on S. 1004, Senate 90th Cong., 1st Sess. (1967); same on H. R. 3300, House, 90th Cong., 1st Sess. (1967); same, Part II, 90th Cong., 2nd Sess. (1968).

[17] As others have noted the Act itself was explicit on this score, *e.g.*, Section 301(a)(1) permitting the use of certain capacity in Granite Reef Aqueduct "only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding elevation 3700. . .". (43 U.S.C. § 1521).

[18] At Petition p. 3 the Acts are cited for the years 1960-1971. The identical language was contained in the Act covering FY 1973 appropriations (86 Stat. 621(1972)) as well as in the enactment

somehow be found not to extend to the Section 3 language, the subsequent enactments of 1964 and 1968 discussed above with all of their obvious inconsistencies with the claimed prohibition of Section 3, necessarily accomplished that result.

Not only is the result below consistent with the facts and the law but it is also consistent with the results of another but related action in this Court. In 1963, the National Parks Association and others, as plaintiffs, sought to enjoin then Secretary of the Interior Stewart L. Udall from closing the Glen Canyon Dam diversion tunnels [19] until the Section 1 "protective measures" had been taken. The United States District Court for the District of Columbia refused the injunction.[20] The United States Court of Appeals for the District of Columbia Circuit similarly refused an injunction.[21] Mr. Chief Justice Warren on January 18, 1963 likewise denied the injunction.[22]

The question raised now has thus in effect already been decided. There are no special and important reasons for granting certiorari, nor any conflict among decisions of the courts of appeals. No important federal question is involved and certiorari is thus unwarranted.

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just last August 16, 1973 covering FY 1974 funds (P. L. 93-97, 87 Stat. 323) as follows: "*Provided*, That no part of the funds herein approved shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument." The only Monument which the waters of Lake Powell can enter is Rainbow Bridge National Monument.

[19] These tunnels carry the river around the dam during construction and are plugged or closed to commence the storage of water.

[20] C. A. No. 3904-62, 1963.

[21] No. 17,527, Sept. Term 1962 (1963).

[22] October Term, 1962 (Jan. 18, 1963). As we noted at the outset, on May 14, 1973 this Court denied an application by Petitioners to vacate the action of the 10th Circuit in staying the injunction against continued filling granted by the District Court 411 U.S. 980, 36 L.Ed.2d 956.

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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